

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TOBY KEVIN ANDERSON,

CASE NO. 13-5893 RJB-KLS

Petitioner,

## ORDER ON REPORT AND RECOMMENDATION

PATRICK GLEBE,

## Respondent.

This matter comes before the Court on the Report and Recommendation of U.S.

17 Magistrate Judge Karen L. Strombom. Dkt. 21. The Court has considered the Report and  
18 Recommendation and the remaining record.

19 Petitioner seeks habeas relief under 28 U.S.C. § 2254 from his 210 month sentence after a  
20 2009 conviction for first degree robbery while armed with a firearm, first degree criminal  
21 impersonation, and second degree prowling. Dkt. 1.

1 He raises the following grounds for relief:

- 2 1) Petitioner “was denied due process of law under the Fourteenth Amendment to the  
3 United States Constitution when he was convicted of robbery despite the fact that the  
4 State provided insufficient evidence to prove he acted as an accomplice to the crime.”  
5 a) It was “speculation that Petitioner got out of the defendants’ vehicle while at  
6 the victims’ residence;”  
7 b) “Even with the aforesaid speculative testimony, the evidence was insufficient;  
8 there was evidence that someone “just stood there;”  
9 c) “Even if the evidence was sufficient to establish that Petitioner acted as an  
10 accomplice to a crime, it was to theft not robbery.”  
11 2) Petitioner “was denied effective assistance of counsel under the Sixth and Fourteenth  
12 Amendment to the United States Constitution when his trial counsel failed to object  
13 to the admission of testimony about the images produced by a malfunctioning camera  
14 and monitor.”  
15 3) Petitioner “was denied due process of law under the Fourteenth Amendment to the  
16 United States Constitution when the trial court gave instruction No. 15, which  
17 allowed the jury to convict Petitioner as an accomplice to a different crime (theft)  
18 than the one he was charged with (robbery) and thereby relieved the state of the  
19 burden of proof.”  
20 4) Petitioner “was denied his right to a fair trial before a fair and impartial judge under  
21 the Sixth and Fourteenth Amendments to the United States Constitution when the trial  
22 judge, who is related to the victims, failed to recuse himself.

23 Dkt. 1.

1 On April 9, 2014, the Report and Recommendation was filed, recommending that Claim  
2 One, subparts a and b, and Claim Three, in its entirety, be dismissed for failure to properly  
3 exhaust. Dkt. 21. It recommends denying the remainder of the habeas petition on the merits. *Id.*  
4 Lastly, the Report and Recommendation recommends denying the issuance of a certificate of  
5 appealability. *Id.*

6 The Report and Recommendation should be adopted for the reasons stated therein and the  
7 petition dismissed. Further, a certificate of appealability should not issue.

8 It is **ORDERED** that:

- 9 1) The Report and Recommendation (Dkt. 21) **IS ADOPTED**;
- 10 2) Subparts a and b of Claim 1 and Claim 3 of the habeas petition are **DISMISSED for**  
**failure to exhaust**; Subpart c of Claim 1, Claim 2, and Claim 4 are **DENIED on the**  
**merits and DISMISSED WITH PREJUDICE**;
- 11 3) The certificate of appealability is **DENIED**;
- 12 4) The Clerk is directed to send copies of this Order to Petitioner, counsel for  
13 Respondent and to the Hon. Karen L. Strombom.

14 Dated this 28<sup>th</sup> day of April, 2014.

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19 ROBERT J. BRYAN  
United States District Judge  
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